NO. 56615-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RODNEY DOTSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Sue Wilson, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Even one biased juror is structural error that requires reversal of a criminal conviction. In appellant Rodney Dotson's case, three jurors expressed actual bias during voir dire. Juror 10 said yes, twice, when asked about bias against the defense. Jurors 30 and 31 raised their hands to express agreement with the idea that there must be some guilt because of the number of charges filed. No one elicited any subsequent assurances of fairness from these jurors. The jury that included these three biased jurors found Dotson guilty of nine sex offenses.

In addition, Dotson's attorney failed to object when the complaining witness' hearsay statements identifying Dotson to her counselor were admitted in violation of the rules of evidence. These errors require reversal of Dotson's convictions.

Alternatively, resentencing is required because the court imposed an exceptional sentence above the standard range based in part on an invalid aggravating factor and imposed an

unconstitutional and unauthorized condition of community custody.

B. ASSIGNMENTS OF ERROR

1. Dotson was denied the right to an impartial jury when the court failed to excuse jurors 10, 30, and 31, all of whom expressed actual bias.

2. The court erred in denying Dotson's motions to excuse jurors 30 and 31 for cause.

3. The court erred in admitting out-of-court statements that did not qualify as statements made for the purpose of medical treatment.

4. Dotson received ineffective assistance of defense counsel when his attorney failed to renew the objection to inadmissible hearsay.

5. The court erred in imposing an exceptional sentence based on facts that the legislature already considered in setting the standard sentencing range.

6. The court erred in prohibiting Dotson, as a condition of community custody, from possessing or consuming any mind-or- mood altering substance. CP 132.

Issues Pertaining to Assignments of Error

1. All accused persons are constitutionally entitled to an impartial jury. During voir dire, juror 10 answered, "Yes," when asked if he had a bias, believing Dotson was guilty of something. Jurors 30 and 31 raised their hands to indicate agreement with the idea that there must be some guilt because of the number of charges filed. None of the three subsequently provided any assurance of impartiality. Did the court violate Dotson's constitutional right to an impartial jury when it failed to excuse these jurors?

2. All accused persons are constitutionally entitled to effective assistance of defense counsel. Was Dotson's attorney ineffective in failing to renew his objection to inadmissible hearsay after it became clear the foundational requirements were not met?

3. Courts may not impose a sentence exceeding the standard range based on factors (such as the elements of the offenses) that the legislature considered in setting the standard range. Dotson was convicted of nine counts of rape of a child and child molestation. The jury also found each offense was part of an ongoing pattern of sexual abuse. When the jury did not indicate that the pattern consisted of anything other than the other convictions, did the court err in imposing an exceptional sentence based on this factor?

4. Community custody conditions must be sufficiently specific to permit persons to understand what is prohibited and to prevent selective and arbitrary enforcement. Prohibitions on conduct must also be crime-related. Should the court strike the condition prohibiting Dotson from possessing or consuming mind- or- mood altering substances because it is unconstitutionally vague and lacks a reasonable relationship to the offense?

C. STATEMENT OF THE CASE

1. Dotson's stepdaughter accused him of ongoing sexual contact.

Rodney Dotson began dating his girlfriend in 2005. 1RP[1] 429. In 2006, the couple moved in together. 1RP 430-31. In the early years of their relationship, Dotson's girlfriend was working and attending school, so Dotson stayed home to keep house and care for the children. 1RP 432. Later, as the children got older, he also worked outside the home. 1RP 434-35.

When she was 17, L.J.M, the daughter of Dotson's girlfriend, called Dotson on the phone to confront him about alleged sexual contact. 1RP 471-73. A police officer, who was listening in on the phone call, testified to Dotson's statements. 1RP 477. According to the officer, Dotson apologized, admitting he had been irresponsible and selfish. 1RP 477.

[1] There are seven volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Aug. 2, 3, 4, 5, 6, 9, 2021; 2RP Jan. 4, 2022.

At trial, Dotson testified his apology referred to one incident, occurring when L.J.M. was 14, in which she pressed her breasts against his shoulder, he asked if she wanted to "fool around," and the two had sex. 1RP 570-71. He denied any other sexual contact with L.J.M. 1RP 570.

The Thurston County prosecutor charged Dotson with two counts of first-degree rape of a child, two counts of first-degree child molestation, two counts of second-degree rape of a child, one count of second-degree child molestation, one count of third-degree rape of a child, and one count of third-degree child molestation. CP 5-7. For each count, the state alleged the offense was part of an ongoing pattern of sexual abuse over a prolonged period of time. CP 5-7.

At trial, L.J.M. testified to multiple instances of sexual contact and intercourse beginning when she was in the fifth grade and continuing until she was a sophomore in high school and asked Dotson to stop. 1RP 385-408. She repeated her allegations to a friend, her mother, her counselor, and a nurse at the hospital,

all of whom testified at trial about her statements. 1RP 375-76, 445, 459, 530.

Before trial, Dotson moved to exclude L.J.M.'s statements to the nurse and the counselor that were not made for purposes of medical diagnosis or treatment under ER 803(a)(4). CP 16; 1RP 22-33. The court denied the motion and admitted the testimony, subject to the state laying the proper foundation. 1RP 32-33.

At trial, counselor Tanya Lyon was the state's first witness. She testified that it was important for her to learn the identity of an alleged abuser because she was required by law to report such incidents to law enforcement. 1RP 370-71. When asked if it was important to her therapeutic intervention, she said it would depend, that she was not a specialist in child sexual abuse and that she would refer a patient to a specialty provider. 1RP 371. Ultimately, Lyon testified L.J.M. told her she had been having sex with Dotson since she was 11. 1RP 375-76.

There was no physical evidence. 1RP 551. To support L.J.M.'s accusations, the state presented testimony by L.J.M.'s

close friend regarding a few strange conversations she had with Dotson. 1RP 457-58. The friend and her mother had lived with Dotson and L.J.M. for approximately two years. 1RP 456. The friend claimed that, on one occasion, Dotson said he overheard L.J.M. masturbating and mimicked the sound with his hands. 1RP 457. On another occasion, she claimed, he categorized L.J.M. as submissive compared to the other women in the household. 1RP 458. In a third conversation, she said he told her that adults attracted to children should not be put on a registry and posited, speaking in the first person, that if he were to seek help and a child were to go missing, he would be the first one police would speak to. 1RP 458.

In closing argument, the defense argued Dotson had taken responsibility and should be convicted only of count 8, which he had admitted in his testimony. 1RP 656.

2. Before trial, three jurors expressed bias against the defense.

Juror 10 informed the court that his wife is a social worker supervisor who has worked with Child Protective Services for

many years, and indicated, "I don't know if I can really be 100 percent biased [sic]. I mean, I have some biases because of her talking over certain things that she's learned over 40 years of being in the field." 1RP 146-47. The following exchange then occurred:

> Defense counsel: So you think you have bias at this time regarding one side or another
>
> Juror 10: Yes.
>
> Defense counsel: And that would be what, sir?
>
> Juror 10: It's almost always the males.
>
> Defense counsel: So right now you have a bias, believing that my client is guilty of something?
>
> Juror 10: Yes.
>
> Defense counsel: And do you think that would interfere with your ability to be an unbiased juror?
>
> Juror 10: It depends on how the case is presented, I would presume. Hopefully I'm a fair person.

1RP 147.

A bit later, defense counsel mentioned the presumption of innocence and asked, "Does anybody feel that there is a guilt here already?" Juror 10 answered, "10," and defense counsel

acknowledged, “10 said he might have some bias because of his wife and what she does for a living. Anybody else?” 1RP 151.

During the second panel, another juror mentioned feeling biased in favor of the state, feeling that some guilt must exist because nine charges were brought. 1RP 275. Defense counsel asked if any others felt the same way. 1RP 275. He noted, “Number 30 raised your hand?” and Juror 30 stated, “I don’t know. I’m on the fence.” 1RP 276. Juror 31 then spoke up saying, “I was on the fence too on the question.” 1RP 276. Defense counsel then asked if juror 31 would prefer to be in a different type of trial, and juror 31 answered, “Me? Yeah, I guess when I heard the initial allegations and everything, it just kind of threw me into like, oh, my goodness, and, you know, that’s something that’s – again, it’s – I don’t – I don’t know if it just instantly makes you think. Again, you have to see all the evidence of course. But I don’t know. I don’t know. I just …” 1RP 276.

Defense counsel then moved to excuse jurors 30 and 31 for cause based on their indications of bias. 1RP 284-85. The prosecutor stated that her notes indicated jurors 30 and 31 eventually stated that they would have to see the evidence. 1RP 286. The court reasoned that neither of them had said anything close to what the original juror had said regarding bias in favor of the state. 1RP 287. The court concluded, "And there needs to be more expressed statements, one way or another, for the court to make a decision on cause. And so I am denying the rest of the motions for that basis." 1RP 287.

3. Dotson now appeals his convictions.

The jury found Dotson guilty on all charges and answered "yes" to the special verdicts on the aggravating factor that each offense was part of an ongoing pattern of sexual abuse over a prolonged period of time. CP 58-66, 81-89. The court found an additional aggravating factor that there were multiple current offenses and the high offender score resulted in some of them going unpunished. CP 105.

The court imposed an exceptional indeterminate sentence of 408 months to life for counts one and two, with lesser sentences on the remaining counts all to run concurrently. CP 120-21. The court also imposed community custody for life on counts 1-6, including a community custody condition that Dotson "shall not possess or consume any mind or mood altering substances." CP 121, 132. Dotson timely filed notice of appeal. CP 140.

D. ARGUMENT

1. Dotson was denied his constitutional right to a fair trial by an impartial jury.

Juror 10 acknowledged he was biased and tended to believe Dotson was guilty because of his wife's experience as a social worker. Jurors 30 and 31 raised their hands to indicate agreement with another juror who stated that guilt must exist because nine charges were filed. None of these jurors unequivocally expressed confidence they could be unbiased, could render a fair verdict based on a presumption of innocence, or could hold the state to its burden of proof. The court denied

defense motions to excuse two of the three for cause, and all three served on the jury. Dotson's convictions must be reversed because these three jurors' statements showed actual bias in violation of Dotson's right to an impartial jury.

Dotson is entitled to trial by a fair and impartial jury. State v. Irby, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015) (citing Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995)). A potential juror must be excused for cause if his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Gonzales, 111 Wn. App. 276, 277-78, 45 P.3d 205 (2002)).

When even one juror is biased or prejudiced, a defendant is denied his constitutional right to an impartial jury. Irby, 187 Wn. App. at 193 (citing In re Personal Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013)). It is well established that seating a biased juror is never harmless and requires a new trial regardless

of actual prejudice. State v. Gutierrez, ___ Wn. App. 2d ___, 513 P.3d 812, 814 (2022) (citing State v. Guevara Diaz, 11 Wn. App. 2d 843, 851, 456 P.3d 869 (2020), rev. denied, 195 Wn.2d 1025 (2020).

Certain statements are "clear indicator[s] of bias" that should prompt either questioning to neutralize the bias or a challenge for cause. Irby, 187 Wn. App. at 195 (discussing Gonzales, 111 Wn. App. at 282). "'When a juror makes an unqualified statement expressing actual bias, seating the juror is a manifest constitutional error.'" Gutierrez, ____ Wn. App. 2d ____, 513 P.3d at 814 (quoting Irby, 187 Wn. App. at 188). The issue may, therefore, be raised for the first time on appeal. Irby, 187 Wn. App. at 193.

After an expression of actual bias, the trial judge has a duty to inquire further or excuse the juror. Gutierrez, ____ Wn. App. 2d ____, 513 P.3d at 816 (citing Guevara Diaz, 11 Wn. App. 2d at 855). Regardless of any motion by a party, the judge has a continuous obligation to excuse any juror who is unfit and unable

to perform the duties of a juror. Guevara Diaz, 11 Wn. App. 2d at 856. The trial judge's ruling on a motion to excuse a juror due to bias is generally reviewed for abuse of discretion. Id. However, that discretion is abused when the ruling is based on untenable grounds or reasons or fails to meet the demands of basic fairness. Id.

The trial court should always presume juror bias if it hears "'statement of partiality without a subsequent assurance of impartiality.'" Guevara Diaz, 11 Wn. App. 2d at 855.

a. Juror 10 expressed actual bias and failed to provide a subsequent assurance of impartiality.

Juror 10 affirmed several times that he was biased against Dotson. Actual bias means "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). Juror 10's statements here are akin to those that resulted in reversal in Irby.

In Irby, a juror who worked for Child Protective Services informed the court that that made her "more inclined towards the prosecution, I guess." 187 Wn. App. at 190. When the court asked if her job would impact her ability to be fair and impartial and listen to the whole story, she said, "I would like to say he's guilty." Id. There was no further follow up except a general question to the group. Id. The court asked, "does everybody here think that they can basically make a finding of guilty or not guilty based on the evidence that you hear? Yes? Okay. Alright." Id. at 192.

On appeal, this Court concluded the juror made an unqualified statement of actual bias. Id. at 196. The court also noted that no one attempted to elicit from the juror "an assurance that she had an open mind on the issue of guilt." Id. The court dismissed the general question to the group as insufficient when a juror has expressed actual bias. Id. The court found it was manifest constitutional error to seat this juror and reversed Irby's conviction. Id.

In this case, Juror 10 affirmed his bias against the defense three times. 1RP 147, 151. When asked if he had a bias, he twice answered, "Yes." 1RP 147. After these unequivocal answers, the only follow up questioning resulted merely in a vague "hope" that he could be fair. 1RP 147. Even after that statement, juror 10 continued to affirm feeling, "that there is a guilt here already." 1RP 151. Like the juror in Irby, juror 10 in this case made unequivocal statements of bias.

Because Juror 10 made unqualified statements of bias, the court had an obligation either to excuse the juror or to inquire further. Guevara Diaz, 11 Wn. App. 2d at 855. However, in this case, neither occurred. No one inquired to determine whether Juror 10 could set aside his bias or "maintain an open mind on the issue of guilt." Gonzales, 111 Wn. App. At 281-82. Allowing a biased juror to serve on a jury requires a new trial without a showing of prejudice. Irby, 187 Wn. App. at 193. Under Irby, reversal is required.

b. Jurors 30 and 31 should also have been excused due to actual bias.

Jurors 30 and 31 each raised their hands to indicate they agreed with another juror who believed there must be some guilt because the state had brought nine charges against Dotson. 1RP 275. When defense counsel followed up, each of them backpedaled a bit, declaring themselves to be "on the fence." 1RP 276. The court erred in denying Dotson's motions to excuse them for cause.

The court reasoned that jurors 30 and 31 had not made sufficient expression of bias to support excusal. 1RP 287. This was an untenable basis after each of them had raised a hand to indicate agreement with juror 41, who felt that, because nine charges had been brought, there must be some guilt. 1RP 275. The subsequent indication that they were "on the fence" was not sufficient to rehabilitate them.

Rehabilitating a biased juror requires a clear showing that the juror "had come to understand that he must lay his preconceived notions aside, in order to serve as a fair and

impartial juror." Gonzales, 111 Wn. App. at 281. It must be clear that the juror "understood the presumption of innocence and had an open mind on the issue of guilt." Id. at 281-82. The juror must "express confidence in her ability to deliberate fairly or to follow the judge's instructions regarding the presumption of innocence." Id. at 282.

For example, in Gonzales, a juror indicated she would presume a police witness was telling the truth because she was raised to believe police officers were credible and honest. Id. at 278-79. The state attempted rehabilitation by asking if she could maintain the presumption of innocence even with a police officer on the witness stand. Id. at 279. She answered, "I don't know." Id. The court determined the juror should have been excused and ordered a new trial. Id. at 282.

The same result should accrue here. Nothing in the exchanges with jurors 30 and 31 rehabilitated their understanding of the presumption of innocence or willingness to follow the court's instructions. 1RP 275-76. Their indication of being "on

the fence" is akin to the juror in Gonzales saying she didn't know. 111 Wn. App. at 279; 1RP 276.

The court's reasoning that a clearer expression of bias was required is incorrect and untenable. Each juror raised a hand to indicate their agreement with the proposition that a certain amount of guilt must exist because the state brought nine charges. 1RP 275. This position is inconsistent with the presumption of innocence and required excusal absent a clear expression of rehabilitation. The presence of Jurors 30 and 31 also requires reversal of Dotson's convictions.

The presence of even one biased juror serving on the jury requires reversal of a conviction. Irby, 187 Wn. App. at 193. Dotson's trial was marred by the presence of three biased jurors. This Court should reverse.

2. Dotson's attorney was ineffective in failing to object to L.J.M.'s out-of-court statements to her counselor because they were not made for purposes of medical diagnosis or treatment.

L.J.M.'s counselor testified her purpose in learning the identity of the person L.J.M. accused of sexually abuse was to

report it to law enforcement. 1RP 370-71. When asked how the identity of the accused pertained to her treatment and diagnosis, she deferred to more qualified specialists in the area of child sexual abuse. 1RP 371. Although this was insufficient to meet the requirements of an exception to the general ban on hearsay, Dotson's attorney failed to renew his pre-trial objection. This was deficient performance that violated Dotson's constitutional right to effective assistance of defense counsel and requires reversal of his convictions.

All accused persons enjoy the constitutional right to effective assistance of defense counsel. U.S. Const. amend. VI; Const. art. I, § 22; State v. Vazquez, 198 Wn.2d 239, 247, 494 P.3d 424 (2021). This right is violated when two conditions occur: 1) defense counsel's performance was deficient and 2) there is a reasonable probability that, without defense counsel's errors, the result would have been different. Vazquez, 198 Wn.2d at 248 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). A reasonable probability is

lower than the preponderance of the evidence and requires only a showing that undermines confidence in the outcome. Vazquez, 198 Wn.2d at 248 (citing Strickland, 466 U.S. at 694; State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017)).

When defense counsel fails to object to inadmissible evidence, "then they have performed deficiently, and reversal is required if the defendant can show the result would likely have been different without the inadmissible evidence." Vazquez, 198 Wn.2d at 248-49. Ineffective assistance of counsel is a constitutional error that may be raised for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Here, Dotson's convictions must be reversed because counsel's failure to renew the objection led to the admission of inadmissible hearsay.

a. L.J.M.'s out-of-court statements to Lyon identifying Dotson were inadmissible hearsay.

A statement made outside the courtroom is hearsay when it is used to prove the truth of the matter asserted. ER 801. Unless

an exception applies, hearsay is inadmissible. ER 802. At issue here is the exception noted at ER 803(a)(4) allowing admission of statements made for purposes of medical diagnosis and treatment. The rule allows "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." ER 803(a)(4). The rule requires that both the speaker and the listener have the purpose of promoting medical treatment. State v. Doerflinger, 170 Wn. App. 650, 664, 285 P.3d 217 (2012). Evidentiary rulings are reviewed for abuse of discretion. State v. Burke, 196 Wn.2d 712, 741, 478 P.3d 1096, cert. denied, 142 S. Ct. 182, 211 L. Ed. 2d 74 (2021). A court abuses its discretion when it fails to adhere to the requirements of an evidentiary rule. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

L.J.M.'s statements to Lyon identifying Dotson fail to meet the requirements of the statute because they were not

pertinent to Lyon's therapy. On the contrary, Lyon testified her purpose was to report to law enforcement. 1RP 370. She disavowed any reliance on the identity of the accused in her therapeutic intervention. 1RP 370-71. Under these circumstances, L.J.M.'s statements identifying Dotson were "more like a general attribution of fault, which is not reasonably pertinent to medical diagnosis or treatment." Burke, 196 Wn.2d at 743. Nothing in Lyon's testimony established that such statements of identity were in any way pertinent to her counseling. The testimony fails to meet the requirements of the rule and was, therefore, inadmissible.

Nothing in the record suggests counsel's failure to object was in any way strategic. On the contrary, before trial, counsel made and argued a written motion to exclude the testimony, indicating the strategy was to try to prevent the jury from hearing harmful repetitions of the complainant's accusations. CP 16; 1RP 22-33. The court's ruling on those motions made clear that a new objection would be necessary if the proper foundation was not

laid. CP 18; 1RP 32-33. There was no benefit to Dotson in his attorney remaining silent when that foundation was not laid, and it became clear that the testimony did not meet the requirements for an exception to the general ban on hearsay.

b. This error undermines confidence in the outcome.

Repetition is not indicative of veracity. E.g., State v. Harper, 35 Wn. App. 855, 858, 670 P.2d 296 (1983). However, repetition of an improper argument increases the likelihood the jury will be affected by it. See State v. Walker, 164 Wn. App. 724, 738, 265 P.3d 191, 199 (2011), rev. granted, cause remanded, 175 Wn.2d 1022 (2012). The impact of a complaining witness' account is similar. Although repetition is not a valid test for veracity, it is likely to have precisely that erroneous effect on jurors. As this Court has noted, jurors "could have inferred that, because [the complainant] consistently described the sexual abuse during her repeated disclosures to her counselor, it was more likely that she was telling the truth." State v. Alexander, 64 Wn. App. 147, 152, 822 P.2d 1250 (1992).

Counsel's failure to object to inadmissible hearsay contributed to the repetition of the complainant's accusations, unfairly influencing the jury's assessment of her credibility. This error undermines confidence in the outcome and requires reversal of Dotson's convictions.

3. The court erred in imposing an exceptional sentence based on facts inherent to the convictions.

Alternatively, this Court should remand for resentencing because the court erred in imposing an exceptional sentence based on an aggravating factor that is inseparable from the elements of the convictions. See State v. Ferguson, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001) (exceptional sentence may not be based on factors necessarily considered by the legislature in setting the standard range). Dotson was convicted of nine counts of rape of a child and child molestation, and the jury found each offense was part of an ongoing pattern of sexual abuse. CP 58-66, 81-89. Because there is no way to tell whether the jury relied on a

pattern consisting solely of the other convictions, the aggravating factor is invalid, and the exceptional sentence must be vacated.

The court's authority to impose criminal sentences is limited to that granted by the legislature, which fixes the punishment for crimes. State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719, 718 P.2d 796 (1986). An unlawful sentence may be challenged for the first time on appeal. State v. Mercado, 181 Wn. App. 624, 632, 326 P.3d 154 (2014).

The legislature has mandated standard sentencing ranges for most criminal offenses, based largely on the seriousness of the offense and the number and severity of prior and other current offenses. RCW 9.94A.510. Only in specified circumstances may the court impose a sentence outside the standard range. RCW 9.94A.505. When imposing an indeterminate sentence for a sex offense under RCW 9.94A.507, it is the minimum term that must be within the standard range.

To support a departure from the standard range, an aggravating factor cannot be an element of the offense. State v.

Falling, 50 Wn. App. 47, 54, 747 P.2d 1119 (1987). An aggravating factor is valid only if it accounts for factors other than those that the legislature necessarily considered in setting the standard range for the offense. Ferguson, 142 Wn.2d at 649; State v. Dunaway, 109 Wn.2d 207, 218, 743 P.2d 1237 (1987).

Here, the jury found by special verdict that each count was "part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time." RCW 9.94A.535(3)(g); CP 81-89. The problem is that, in order to convict Dotson of the nine charged offenses, the jury also had to find multiple incidents over a prolonged period of time. CP 35-55, 58-66. The charges encompassed nine acts over three time periods based on L.J.M.'s age at the time. CP 35-55. Four counts were alleged when she was under 12, three counts when she was between 12 and 14, and two counts when she was between 14 and 16. CP 35-55. The jury could not convict Dotson on all nine charges without finding multiple incidents over a prolonged period of time.

In calculating the standard minimum term for the sentence on each count, the other eight convictions were subjected to the three times multiplier from RCW 9.94A.525(17), and Dotson's standard range was computed based on an offender score of 24. CP 119. Thus, the standard range prescribed by the legislature reflects the fact of the other convictions. To also use the other current convictions as the basis for an exceptional sentence would violate the principle from Ferguson and Dunaway because they were necessarily considered in computing the standard range. Ferguson, 142 Wn.2d at 649; Dunaway, 109 Wn.2d at 218.

A contrary example illustrates this principle. In State v. Hyder, 159 Wn. App. 234, 261-62, 244 P.3d 454 (2011) the court upheld an exceptional sentence based on the prolonged pattern of abuse aggravator. In that case, the court noted that "a single act of the noted conduct is all that is required for a conviction." Id. Therefore, the court found that the noted elements of the underlying offense were different from the requirements of the ongoing pattern aggravating factor. Id.

Here, by contrast, Dotson was not convicted of "a single act." He was convicted of nine counts over a period of more than two years. CP 58-66. Unlike in Hyder, the requirements for Dotson's convictions are not different from the requirements of the ongoing pattern aggravating factor.

The state will likely argue that there were other incidents the jury could have relied on to find the aggravator. But no special verdict on this question was presented. Nothing about the jury instructions or the closing argument suggested the jury needed to find any incidents supporting the pattern beyond the nine convictions. 1RP 608-676; CP 68-80. The jury was instructed it must consider each count separately and unanimously agree on one act for each count. CP 30, 35, 41, 46. It was not instructed that it could not find an aggravating factor based on the same acts underlying the guilty verdicts on the offenses themselves. CP 68-80. There is no way to know which acts the jury relied on to find a pattern when rendering its special verdict on the aggravating factor.

Because there is no way to know which incidents the jury relied on, the verdict is ambiguous. When the jury does not indicate which act it relied on, any ambiguity is resolved in favor of the accused. State v. Deryke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), aff'd, 149 Wn.2d 906 (2003); State v. Taylor, 90 Wn. App. 312, 317, 950 P.2d 526 (1988). Additionally, an ambiguity may not, when an alternative explanation exists, be construed in such a way as to increase the punishment imposed. Taylor, 90 Wn. App. at 317 (citing United States v. Baker, 16 F.3d 854, 857-58 (8th Cir. 1994)**Error! Bookmark not defined.**).

Under Taylor, and Deryke, this Court must apply the rule of lenity and assume the jury found a pattern consisting of the same incidents for which Dotson was already found guilty. Because the other convictions cannot legally support a departure from the standard range, this aggravating factor must be vacated. Ferguson, 142 Wn.2d at 649.

Remand for resentencing is required. See State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). When one of two factors relied on in departing from the standard range is invalid "remand for resentencing is necessary where it is not clear whether the trial court would have imposed an exceptional sentence on the basis of only the one factor upheld." Id. Thus, remand is generally not necessary if the court expressly indicates it would have imposed the same sentence based solely on the remaining factor. Id.; State v. Moses, 193 Wn. App. 341, 366 n. 12, 372 P.3d 147 (2016) (declining to address other aggravating factors because "trial court found it would have imposed the same sentence even if only one aggravating factor existed"); State v. Poston, 138 Wn. App. 898, 908, 158 P.3d 1286 (2007) (affirming sentence when "court expressly stated that it would have imposed the 180-month sentence on the basis of any of the listed factors").

This scenario is distinguished from cases in which the trial judge merely affirmed that the factors individually provide

independent authority for the sentence. See, e.g., State v. Weller, 185 Wn. App. 913, 930, 344 P.3d 695 (2015) (remanding when trial court stated either of two aggravating factors independently authorized exceptional sentence but did not say it would impose the same length exceptional sentence based on one factor standing alone). This case is more like Weller, and remand for resentencing is needed.

Here, the trial court did not mention whether the same sentence would have been imposed based on only one of the aggravators. CP 104-06; 2RP 1-22. The written findings and conclusions state only that the two aggravating factors were found and that, "an exceptional sentence is appropriate." CP 106. There was no indication of whether the judge would have imposed the same sentence based on the only remaining aggravating factor. Remand for resentencing is, therefore, necessary. Weller, 185 Wn. App. at 931.

4. The court erred in requiring, as a condition of community custody, that Dotson abstain from all mind- or mood-altering substances.

As a condition of his community custody, which under the current sentence is imposed for the remainder of his life, the court ordered Dotson, "shall not possess or consume any mind or mood altering substances." CP 132. This condition is unconstitutionally vague and unrelated to his convictions. Thus, it is unauthorized by statute and must be stricken.

Unlawful sentencing conditions are errors that may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). They may also be challenged pre-enforcement when the challenge involves a legal question that may be resolved based on the existing record. Id. Whether a trial court imposed an unauthorized community custody condition is an issue of law reviewed de novo. State v. Coombes, 191 Wn. App. 241, 249, 361 P.3d 270 (2015) (citing State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)).

As discussed above, the court's authority to impose criminal sentence is limited to that delegated by the legislature by statute. The relevant statutes for conditions of community custody provide for three types of conditions: mandatory, waivable, and discretionary. RCW 9.94A.703. The condition imposed by the court in this case is not authorized by law.

The mandatory conditions are: informing the Department of Corrections of any court-ordered treatment, complying with any conditions imposed by the Department, and not residing in a community protection zone. RCW 9.94A.703(1). None of these include a prohibition on mind or mood altering substances.

Conditions that the court may waive are: contact the assigned community corrections officer as directed; work at department-approved education, employment, or community restitution; refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions; and obtain prior approval of the department for residence location and living arrangements. RCW 9.94A.703(2). The condition

regarding mind- and mood-altering substances is not authorized by any of the waivable conditions because it is far broader than merely a ban on "controlled substances," which would be authorized.

Many mind- and mood-altering substances are not "controlled substances." "Controlled substances" means "a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or commission rules, but does not include hemp or industrial hemp as defined in RCW 15.140.020." RCW 69.50.101(o). Schedules I through V include such substances as fentanyl, opium and its derivatives, LSD and other hallucinogens, and cocaine. Schedules I through V do not include alcohol. Nor do they include common mood-elevating substances such as sugar and caffeine, all of which are legal to possess and consume without a prescription. Thus, the prohibition on all mind- and mood-altering substances is not authorized by the law permitting a prohibition on controlled substances.

The discretionary conditions that the court may impose are:

> (a) Remain within, or outside of, a specified geographical boundary;
>
> (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
>
> (c) Participate in crime-related treatment or counseling services;
>
> (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
>
> (e) Refrain from possessing or consuming alcohol; or
>
> (f) Comply with any crime-related prohibitions.

RCW 9.94A.703(3). This section allows the court to prohibit alcohol possession or consumption. Id. But it does not mention other mind- or mood-altering substances such as caffeine or sugar. Thus, such a prohibition is only allowed if it qualifies as a "crime-related prohibition" under subsection (f).

A "crime-related prohibition" is an order prohibiting "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "The prohibited conduct need not be identical to the crime of conviction, but there must be 'some basis for the connection.'" State v. Nguyen, 191 Wn.2d 671, 684, 425 P.3d 847 (2018) (quoting State v. Irwin, 191 Wn. App. 644, 657, 364 P.3d 830 (2015)). crime-related conditions of community custody must be supported by substantial evidence of a factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989); State v. Motter, 139 Wn. App. 797, 801, 162 P. 3d 1190 (2007), overruled on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

For example, a prohibition on working as a caretaker for elderly or disabled persons was upheld as crime related when the offender was convicted of theft by gaining the trust of a vulnerable elderly person. State v. Acrey, 135 Wn. App. 938,

946, 146 P.3d 1215 (2006). By contrast, the court held it was not a valid crime related prohibition to prohibit a sex offender from earning a financial profit by telling her story. State v. Letourneau, 100 Wn. App. 424, 435-36, 997 P.2d 436 (2000). There was no testimony or evidence that any mind- or mood-altering substance played any role in the circumstances of Dotson's convictions. Therefore, it is not crime-related, and the court was not authorized to impose it.

Additionally, the condition is unconstitutionally vague. A community custody condition is unconstitutionally vague when, "(1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement." State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). This Court recently acknowledged that a prohibition on "mind and mood altering substances" must be stricken as vague in an unpublished decision. State v. Stone, 12

Wn. App. 2d 1024, 2020 WL 824449 (2020) (unpublished).[2] In that case, the court accepted the state's concession that "this phraseology could include substances that are not controlled substances and are lawful to possess." 2020 WL 824449 at *4.

The community custody condition prohibiting possession or consumption of mind or mood altering substances must be stricken because the law does not authorize the court to impose it and it is unconstitutionally vague.

E. CONCLUSION

For the foregoing reasons, Dotson requests this Court reverse his convictions. Alternatively, he asks this Court to remand for resentencing.

DATED this _____ day of _____, 2022.

[2] This unpublished decision cited under GR 14.1, has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

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Respectfully submitted,

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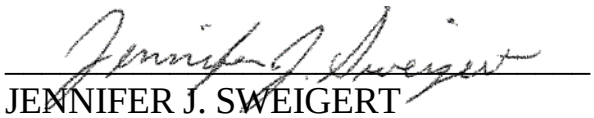

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